

No. 48462-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:

GRETCHEN RUFF,

Petitioner,

And

WILLIAM WORTHLEY,

Respondent.

REVIEW FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE JOHN P. FAIRGRIEVE

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent, William Worthley, the father of the parties' twelve-year-old daughter, agrees with Petitioner's position that the trial court erred in settling a hearing to determine which parent is "actually" the primary parent to determine how to apply the Child Relocation Act presumption in favor of relocation to Respondent's request to relocate with the parties' daughter to Missouri. However, Respondent disagrees that the child relocation act does not apply to this case where there is a facially equal 50/50 parenting plan. Petitioner urges that this court should find that the Child Relocation Act cannot apply to such cases because the child does not "...reside a majority of the time..." with either parent and requests that this matter be to the Superior Court with instructions to dismiss Respondent's relocation action. That position ignores that in the context of a 50/50 parenting plan the statutory provisions at issue are ambiguous. Petitioner's urged interpretation is not consistent with the statutory scheme of the Child Relocation Act, RCW 26.09.260(6) and contrary to the reported legislative history of

the enactment of the Child Relocation Act regarding that specific issue. Respondent urges this Court to interpret the Child Relocation Act to apply to all relocations, including those where there is a 50/50 or shared parenting plan, that the factors of RCW 26.09.520 should be applied to those relocation requests, without a presumption in favor of the relocating party, to permit or restrain relocation of the child and to develop a new parenting plan in the child's best interest. Respondent respectfully requests that this Court remand this case to the trial court with instructions to schedule hearing on Father's proposed relocation and mother's objection to relocation using the standard urged above, and to order a parenting plan in the child's best interest.

II. ASSIGNMENT OF ERROR

Respondent adopts Petitioner's assignment of error.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Does the Child Relocation Act Apply to 50/50 parenting plan.
2. How should the court proceed where a parent in a 50/50 parenting plan complies with the notice requirements of RCW

26.09.430 and RCW 26.09.440 when the parent seeks to relocate with the parties' minor child.

IV. STATEMENT OF FACTS.

For the purpose of this appeal, Respondent adopts Petitioner's statement of facts.

V. ARGUMENT

A. Respondent does not dispute Petitioner's assignment of error that the trial court should not have set an evidentiary hearing to determine the primary residential parent in this case.

Respondent does not challenge Petitioner's argument that the trial court should not have set an evidentiary hearing to determine the "actual" residential parent for the court to apply the presumption of RCW 26.09.520 in favor of either parent in this action. Respondent's position is that the facts regarding Petitioner/ Mother's past relocation to California are not relevant to whether or not a presumption in favor of Respondent/ Father's relocation under the Child Relocation act should apply—it should not. However Respondent notes that those facts, when presented at a hearing, may ultimately be determinative on the issue of whether Father's relocation

proposed relocation with the child might be in the child's best interest. Given Father's position as to these specific facts in this appeal, Petitioner's references to *Marriage of Taddeo-Smith & Smith*, 127 Wn. App. 400, 110 P. 3d 1192, (2005) appear to be irrelevant.

Respondent disputes that the observations of this court regarding the applicability of the Child Relocation Act to a 50/50 plan, articulated in *Marriage of Fahey*, 164 Wn. App. 42, 58-59, 262 P. 3d 128 (2011) rev. denied 173 Wn. 2d. 1019 (2012), were central to this Court's holding as to the ultimate issue decided in that case. Respondent asserts that the Court should consider those statements as dicta. Petitioner's briefing of that case shows that the issue of whether the Child Relocation Act applies to a written and court ordered 50/50 parenting plan was never a question before this Court in that matter.

B. The Child Relocation Act applies to all parenting plans not just parenting plans where one parent is the primary residential parent.

1. Overall structure of the Child Relocation Act.

RCW 26.09.405 states that, "[t]he provisions of RCW 26.09.405 through 26.09.560 and the chapter 21, Laws of 2000

amendments to RCW 26.09.260 ...apply to a court order regarding residential time or visitation with a child...” The definition section of the Child Relocation Act, RCW 26.09.410, applies throughout the act. RCW 26.09.410 defines “court order” as “a temporary or permanent parenting plan...or other order governing the residence of a child under this title” and “relocate” as “a change in the child’s principal residence either permanently or for a protracted period of time.” There are no other definitions. RCW 26.09.410. There is no language in the Child Relocation Act or the relevant provisions of RCW 26.09.260 that prevents the Child Relocation Act from applying to equally shared or 50/50 parenting plans.

The statutory scheme created by the Child Relocation Act grants procedural protections and substantive rights to the parties to a parenting plan. The statute gives a party to a parenting plan a right to notice of an intended relocation in the manner provided by RCW 26.09.430 through 26.09.460 and 26.09.490. RCW 26.09.470 permits a party objecting to a relocation to file objections to the proposed relocation or pursue sanctions if notice was not properly provided. RCW 26.09.480

gives a party a procedure to object to relocation. RCW 26.09.510 permits an objecting party the right to pursue to various forms of temporary relief including a temporary restraining order, *as Petitioner did in this case*. RCW 26.09.500 gives a party who did not file a timely objection to a notice of intended relocation a procedure to make the relocating party's proposed parenting plan permanent. RCW 26.09.550 gives either party the right to seek sanctions for bad faith proposals to relocate or objections to relocation. RCW 26.09.560 grants both parties the right to priority for a hearing on the relocation or modification of the parenting plan pursuant to RCW 26.09.260(6).

The protections that the Child Relocation Act grants to an objecting parent also gives a party seeking to relocate an orderly mechanism to seek relocation without the need to first file a petition to modify the parenting plan per RCW 26.09.260 (1) & (2) meet the relatively onerous burden of showing adequate cause to change an existing parenting plan. RCW 26.09.500 protects a relocating parent from suffering undue detriment that might be caused by a belated objection filed by a party who properly received notice. RCW 26.09.510 benefits a

relocating party by authorizing a court to permit temporary relocation, over an objecting party's objection, if the court determines that the relocating party will likely prevail.

2. The Child Relocation Act Definitions and Notice Provision are ambiguous as applied to 50/50 or shared parenting plans.

At the heart of this dispute are the definition statute, RCW 26.09.420, the notice statute, RCW 26.09.430, and RCW 26.09.520 that provides statutory factors for a court to consider to determine if the request to relocate the child should be granted. RCW 26.09.520 does not refer to the type of parenting plan that a party filing a notice of intended relocation has, but applies a presumption that a properly served notice of intent to relocate will be permitted to a parent who has the child the majority of the time, subject to a trial court's consideration of specific statutory factors.

RCW 26.09.430, the notice statute, states that:

Except as provided by RCW 26.09.460, a person with whom the child resides the majority of the time shall notify every other person entitled to residential time or visitation with the child under a court order if the person intends to relocate. Notice shall

be given as prescribed in RCW 26.09.440 and 26.09.450.

Petitioner argues that because RCW 26.09.430, uses the phrase “...person with whom the child resides the majority of the time...” and the phrase “...child’s principle place of residence...” in the definition of “relocate”, found in RCW 26.09.410 that, by negative implication, the Child Relocation Act must not apply to 50/50 or shared parenting plans. However, in the context of a 50/50 plan both of those phrases are ambiguous considering the context and apparent goals of the overall statutory scheme.

The RCW 26.09.410 (2) definition of “relocate” is a change to a child’s “...principle place of residence...” is ambiguous. In the context of a 50/50 plan the quoted phrase could mean that the child has no principle place of residence or the child has two principle places of residence.

RCW 26.09.430 requires “...a person with whom the child resides a majority of the time...” to give notice of intent to relocate. That can reasonably be interpreted to mean that neither or both parents have a majority of parenting time in a 50/50 or shared parenting plan context. Though the first

interpretation is facially plausible, the latter interpretation makes more sense in the context of a 50/50 parenting plan *in this statutory scheme*. The definition section of RCW 26.09.410 does not include a definition of “majority”. The term “majority” in the relevant statute is easy to apply to a parenting plan where one party clearly has a majority of residential time, but the phrase is harder to apply to the indefinite concept of time in the context of a 50/50 parenting plan. To clarify, there is no statutory guidance as to what timeframe a majority should be measured against in determining which parent spends a true majority of time with the child. The application of a strict definition of majority may not apply to many shared or 50/50 parenting plans, depending on the period of time that is measured or considering holidays that may be in flux because of school schedules. Even in a pure 50/50 parenting plan, with no holiday deviations, one parent will have the child the majority of the overnights in any given year, other than a leap year. Except for cases where a shared parenting plan says “equal time” with no set schedule, Petitioner’s preferred interpretation, if strictly followed, would require the court to engage in day counting and

consideration of school calendars to determine what parent has a majority of residential time with the child over an undefined period, even if the parties clearly intended to have, on average, an equally shared parenting plan.

Petitioner's conclusion that the Child Relocation Act is unambiguous because of the use of the term "majority" in RCW 26.09.430, leads her to urge that this Court to hold that the entire comprehensive scheme of the Child Relocation Act does not apply to *one* specific type of parenting plan: those that are equally shared or 50/50. But that makes no sense. In the context of the statutory scheme the legislature's use of "majority" in RCW 26.09.430 makes the statute ambiguous as applied to 50/50 or shared parenting plans. If a statute is ambiguous, a court will engage in statutory interpretation to determine the intent of the legislature. *State v. Derenoff*, 182 Wash. App. 458, 463, 332 P 3d 1001 (2014). As Petitioner notes a court's first avenue of inquiry is to determine if the statute's plain meaning is ambiguous. *Id.*, at 463. However, the analysis only begins with the ambiguous term's definition. The Washington Supreme Court has explained that meaning,

...is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions and the statutory scheme as a whole.

Lake v. Woodcreek Homeowner's Association, 169 Wash 2d. 516, 526, 243 P. 3d 1283 (2010).

In the context of the statutory scheme the question of whether the Child Relocation Act applies to 50/50 or shared parenting plans becomes clearer. Using the procedures of the Child Relocation Act the primary residential parent can pursue relocation and avoid the adequate cause burdens required for a major modification under RCW 26.09.260(1) & (2). A party with less residential time under a permanent parenting plan that objects to duly noticed relocation can seek a major modification of the parenting plan, pursuant to RCW 26.09.480 and RCW 26.09.260(6), without the need to show adequate cause. Presumably, Petitioner would agree that a party to a parenting plan who has less residential time may relocate, with or without notice, and RCW 26.09.260(5)(b) permits that party to file a petition to adjust the parenting plan without showing adequate

cause under RCW 26.09.260(1) and (2)¹. Petitioner's argument appears to be that a party to a shared parenting plan that plans to relocate must first file a petition for a major modification of the parenting plan, attempt to meet the burden of showing adequate cause under RCW 26.09.260 (1) or (2), and if (when) adequate cause is not met that party must relocate without the child before being able to petition for a change to the parenting plan to develop a residential schedule to accommodate the new distances between the parents' residences. That makes little sense in light of the protections the statute provides to all other parents. The foregoing is the result that Petitioner's desired interpretation of Child Relocation Act and the statute's applicability to this case. However, Petitioner does not explain how any statute in RCW 26.09 requires a court to impose an adequate cause burden to modify a parenting plan on a relocating party, even if the relocating parent is not the majority parent and a subsequent change to the parenting plan would qualify as a major modification pursuant to RCW 26.09.260.

¹ RCW 26.09.260(5)(b) was amended when the Child Relocation Act was passed to read "(b) is based on a change of residence of the parent with whom the child does not reside the majority of the time...".

meet the adequate cause requirement of RCW 26.09.260 (1) or (2) to modify the parenting plan. If the court interprets the statute as Petitioner urges, then the rights and obligations found in the Child Relocation Act cannot be applied to either parent. That position is inconsistent with Petitioner's own actions in this case since she restrained Respondent's move using RCW 26.09.510(1). The notion that the foregoing example is what the legislature intended when it drafted the Child Relocation act is unlikely.

3. The legislative history of the Child Relocation Act resolves the ambiguity of the definitions and the notice provision as applied to 50/50 or shared parenting plans.

When the legislature enacted the Child Relocation Act it amended RCW 26.09.260 by adding, among other provisions, subsection (6) that permits a parent objecting to relocation the ability to file a petition to modify the parenting plan. The amended language states in relevant part:

The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the

majority of the time, without a showing of adequate cause other than the proposed relocation itself. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the standards and procedures provided in sections 2 through 18 of this act....” RCW 26.09.260(6) (DR 54-55)

The plain language of the statute places the onus of filing a petition to modify the parenting plan on the party objecting to relocation, not the reverse as Petitioner urges. More importantly the legislature removed the requirement that an objecting party who files a petition for modification of the parenting plan in a relocation, even a modification that “...includes a change of the residence in which the child resides...”, is not required to meet adequate cause in the relocation context.

There is evidence of how the legislature intended Child Relocation Act to apply to shared or 50/50 parenting plans. The legislative history Respondent provided to the trial court explains how the legislature intended the Child Relocation Act should apply in the present dispute. When the legislature

enacted the Child Relocation Act, Representative Carrell asked the bill's sponsor Representative Constantine "[h]ow does this act apply in situations in which the child resides an equal amount of time with each parent?" In reply, Representative Constantine stated, "[u]nder such circumstances, the notice requirements apply to both parents and the presumption to neither." 1 House Journal 56th Leg., Reg. Sess., at 551 (Wash 2000) (CP 65).

In circumstances where a statute is ambiguous, after a court analyzes the plain meaning of the ambiguous provision(s), the context of the statute where the ambiguous provision(s) is (are) found, and meaning in the context of the statutory scheme, a reviewing court may look to the legislative history of the statute and the circumstance surrounding its enactment to resolve ambiguity and determine the legislative intent. *Lake v. Woodcreek Homeowner's Ass'n*, at 526-527. In this case the sponsor of the bill provided a clear statement of the legislature's intent. Though Petitioner cites authority cautioning that a legislator's comments may not be indicative of legislative intent, the reported statements are not cherry picked from a report of a

lengthy debate by Respondent. The colloquy reported includes the *only* substantive statements by any members of the legislature regarding the Child Relocation Act, clarifying the legislature's intent *as to this specific issue*, and that the legislature found worth reporting in its official journal. The evidence of the legislative intent is clear in this case.

4. The policy that changes to a parenting plan are to be discouraged to provide stability for children and avoid custody litigation are not applicable in the relocation context.

Respondent acknowledges the authorities that Petitioner cites in support of the general principle that Washington statutes and precedent work to enforce the policy that changes to parenting plans are discouraged. In a normal context the requirement that major parenting plan modification meet the adequate cause threshold found in RCW 26.09.260 is intended to promote stability for the parties' children and avoid the harm that frequent, often frivolous, custody litigation does to children. Those authorities do not address modification where, as in a relocation action, the parenting plan *will* change. Petitioner's real argument appears to be that the relocating parent should

bear an assumed automatic burden of less time with the parties' children in favor of the non-relocating party. Further, if the relocating party is unable to meet his or her burden to clear the adequate cause threshold, the relocating parent may never have the opportunity to present evidence that his or her dramatically reduced contact with a child may not be in the child's best interest.

C. The standard for relocation that the trial court should apply is RCW 26.09.520.

Respondent agrees with Petitioner that the trial court did not know how to proceed in this action. The ultimate order that Petitioner appealed from was made in the context of the trial court recognizing that Respondent's failure to meet adequate cause on his Petition for Modification of the Parenting Plan did not resolve the Petitioner's Notice of Intent to Relocate Children. The court sought briefing on how to proceed.

Respondent urged the trial court, as it urges this Court, to follow the legislature's guidance and use the eleven (11) enumerated statutory factors provided by RCW 26.09.520, without applying the statutory presumption in favor of

relocation. Moreover a trial court should be guided by the policy mandate, found in RCW 26.09.002 that

In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.

Respondent respectfully requests that this court remand to the trial court with instructions to the trial court to vacate the order for an evidentiary hearing, that Petitioner appealed from, to order Petitioner to file a proposed alternative parenting plan, and to set a hearing on Respondent's proposed relocation, Petitioner's objection, and determine an appropriate long distance parenting plan.

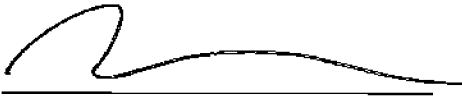
VI. CONCLUSION

Respondent does not object to this Court granting discretionary review of the trial court's Order Re: Evidentiary Hearing and Motion for Revision. Respondent does not argue that setting an evidentiary hearing in this matter to determine the defacto primary parent was in error. Respondent does however respectfully request that the Court not dismiss Respondent's relocation action and instead vacate the Order Re: Evidentiary Hearing and Motion for Revision, and remand to

the trial court with instructions to apply the RCW 26.09.520 statutory factors, without the statutory presumption in favor of relocation to develop a permanent parenting plan in the child's best interest.

Dated this 31th day of August, 2016.

McKINLEY IRVIN, PLLC

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DECLARATION OF SERVICE

I, the undersigned, hereby declare under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

On August 31, 2016, I arranged for service of the foregoing Respondent's Brief, to the court and the parties to this action as follows:

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By:



Michael Hallas, WSBA No. 46104

MCKINLEY & IRVIN PLLC

September 01, 2016 - 11:46 AM

Transmittal Letter

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